United States

Circuit Court of Appeals

For the Ninth Circuit

WILLIAM PAPPAS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United State District Court for the District of Idaho, Eastern Division.

J. L. McCLEAR,
United States Attorney.
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Assistant U. S. Attorney.
Attorneys for Defendant in Error.

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STATEMENT.

The statement of facts embodied in the brief of plaintiff in error is substantially correct, but in connection with that statement it should be noted that the testimony of the witness Baldwin, set forth at page 2 of that brief, and the letter quoted at page 3 thereof, constituted evidence introduced for the purpose of impeaching the witness Zella Pappas, wife of plaintiff

questions propounded in cross examination by counsel for plaintiff in error. None of the testimony referred to was offered or admitted as being competent on the issue of the defendant's guilt or innocence.

Since the status and purpose of the evidence in question is fully covered in our argument upon the different assignments of error, it will be unnecessary to substantiate the foregoing statement by citations to the transcript at this time.

ARGUMENT.

I.

In a prosecution founded upon a violation of the White Slave Traffic Act of June 25, 1910, 36 Stat. at Large, Chap. 395, wherein the wife of a defendant is the victim of such violation, she is competent to testify on behalf of the prosecution, and may do so over defendant's objection.

* * * * * *

Error is assigned as having been committed by the trial court in permitting the wife of plaintiff in error to testify on behalf of the Government without his consent and over his objection. It is urged in his brief that the rule of the common law should have governed the ruling upon this point, and that this case does not fall within the exception to that rule.

Plaintiff in error cites as his principal authority *Bassett vs. U. S.*, 137 *U. S.* 496, 34 *L. Ed.* 762, in which case it is held that the wife may not testify without the consent of her husband in the trial of a criminal action in which the husband is charged with the crime of polygamy. The United States Supreme Court held that such a case fell within the rule, and not within the exception touching cases involving personal injury directed by one spouse against the other. Summing up the whole situation the Court said:

> "Polygamy and adultery may be crimes which involve disloyalty to the marriage relation *but they are*

wife." (Italics ours).

It appears plainly, therefore, that the Supreme Court there held merely that the crime of polygamy is not an injury directed by the husband against the wife personally in such manner as to bring the case within the exception to the rule of marital privilege. Most certainly the Supreme Court did not, either by the rule of law there announced or by its discussion leading to such announcement, hold that the wife's competency is at the present day limited strictly to cases of corporal injury inflicted upon her person by the husband. It is merely stated in the course of the opinion referred to that such was the common law application of the rule at one time. The opinion does state the test to be applied in determining whether a given case falls within the rule of incompetency or within the exception thereto, as they are construed in modern jurisprudence. It is said:

> "* * The question presented * * * is not how much she feels and suffers, *but whether the crime is one against her.*" (Italics ours).

Accordingly this Court, in *Cohen vs. United States*, 214 *Fed.* 23, has heretofore construed the rule in question and there held that the transportation of the wife by the husband in interstate commerce with intent that she shall practice prostitution is such a personal injury to her as to entitle her to testify against him. That case was twice presented to the United States Supreme Court for review, the first time upon petition for a writ of certiorari directed to this Court, and the second upon a petition for a writ of habeas corpus as a substitute for a writ of error, and in both instances the petitioner was denied any relief.

Cohen vs. U. S. (*Mem.*) 235 *U. S.* 696, 35 *Sup. Ct. Rep.* 199, 59 *L. Ed.* 430.
Cohen vs. U. S. (*Mem.*) 238 *U. S.* 607, 35 *Sup. Ct. Rep.* 602, 59 *L. Ed.* 1486.

last cited, we submit that the question presented by the first assignment of error is *res adjudicata* in this Court. The only real authority to the contrary which plaintiff in error cites is the case of *Johnson vs. U. S.* 221 *Fed.* 250, wherein the Court of Appeals of the Eighth Circuit held the wife of a defendant on trial on a similar charge to be incompetent to testify against him. Doubtless the Court had reasons which seemed to it sufficient upon which to premise that holding, but it is certain that those reasons are not stated in the Court's opinion. The Court merely states that "at common law the rule was that neither husband nor wife could testify against each other," and makes no mention of the equally well established exception to that rule. It is then stated that the rule as quoted has not been changed by any statute and that therefore the wife of the defendant was an incompetent witness. We have no inclination to criticise the utterances of the Court, but we submit that the opinion referred to, taken at its full face value, is not persuasive.

We submit the question raised upon the first assignment of error without further argument, merely noting that the following cited authorities appear to us fully to bear out the proposition that the modern trend of judicial opinion is in line with, and fully sustains, the holding of this Court in *Cohen vs. U. S., supra*:

U. S. vs. Rispoli, 189 *Fed.* 271.
U. S. vs. Gwynne, 209 *Fed.* 993.
40 *Cyc. p.* 2356, (*IV*).

> "When * * the interest of justice demanded that the mouth of the husband or wife should be opened, as in prosecutions of either for a crime committed on the other, an exception was recognized from the necessity of the case, and the husband or wife was competent."
>
> *Underhill, Evidence, Section* 166.

Where defendant elicits evidence upon cross-examination of a witness for the prosecution concerning matters not touched upon in the direct examination, the court may in its discretion permit the prosecution to examine such witness concerning prior contradictory statements made by such witness touching the same matters.

* * * * * *

In his second and third assignments of error plaintiff in error attacks the ruling of the trial court admitting in evidence a certain letter written by the witness Zella Pappas, wife of plaintiff in error, and admitting testimony of the witness Baldwin concerning statements made to him by Zella Pappas prior to the commencement of this action.

Error in such rulings is predicated upon two grounds: first, that the witness Zella Pappas was the wife of plaintiff in error at the time of writing such letter and of making such statements, and that the same would not be competent evidence by reason of such marital relation; second, that said letter and said statements were hearsay evidence and were statements made without the hearing of the defendant and therefore incompetent.

As to the first ground of objection, that matter has been fully covered in the first division of our argument, wherein it has been shown that in a prosecution such as this the wife of the defendant, being the victim in the case, is entitled to testify over defendant's objection.

As to the second ground of objection, reference should be had to the transcript of record in order fully to understand the purpose of the evidence objected to and the reasons for its admission. At *Page* 19, *Transcript*, the direct examination of Zella Pappas is commenced, and continues to *Page* 25. It will be noted that the examination merely covers the movements and residence of plaintiff in error and his wife from

Page 27, in cross examination, counsel for plaintiff in error asked the following questions:

> Q. "I will ask you, Mrs. Pappas, if your husband at any time during your acquaintance with him, either before or after your marriage, has ever suggested to you that you engage in the practice of prostitution?"
> A. "No, sir."
>
> Q. "Have you at any time since the marriage of yourself and Mr. Pappas engaged in the practice of prostitution?"
> A. "Since I have been married?"
> Q. "Since you have been married?"
> A. "No, sir."

From this point to the end of the cross examination continues a very exhaustive and detailed inquiry into the personal affairs, life and habits of the witness from the time of her marriage to plaintiff in error.

At *Page* 35, *Transcript*, on re-direct examination, the matters gone into on cross examination, particularly with regard to the witness' statement that she had never practiced prostitution nor been urged or requested to do so by her husband since their marriage, are inquired into. After calling her attention to her statement that her husband had never suggested such practice since their marriage, the letter in question was submitted to the witness, and she admitted the writing thereof. The letter was then offered in evidence, and counsel for the defense objected upon the grounds *that the testimony was privileged* on account of the marital relation. This objection was overruled and counsel for the government commenced to read the letter to the jury, whereupon counsel for the defense interposd a further objection as follows:

> "This letter appears to have been written * * * without the presence of the defendant. Now we think that in view of the fact that it is only offered for the purpose of impeaching this witness' testimony, we con-

will be competent to read, perhaps, but not the entire letter, unless it should be shown that it was written in the presence of the defendant himself."

Whereupon the court limited the reading to that portion of the letter bearing upon the witness' statements on cross examination in connection with which the letter was at this time offered in evidence. (*Transcript, pp.* 36-38).

It will be noted at this point that no objection was interposed to the offer except as already stated, to-wit, that the testimony was privileged on account of the marital relation. It will also be noted that the letter was conceded to be competent for purposes of impeachment. It will further be noted, (*Transcript, p.* 38), that in reply to a question by the court counsel for the government made it plain that the letter was offered only as an impeachment, and not in any sense as evidence bearing upon the issue of the defendant's guilt or innocence.

At *Page* 40, *Transcript*, on re-cross examination, defendant's counsel called upon the witness to explain her purpose in writing the letter, on the hypothesis that the statements therein contained were untrue. The witness answered that she wrote it for the purpose of obtaining certain money which she claimed to be due her from the addressee of the letter, to-wit, five months' wages. At *Page* 42, counsel for the government offered the remainder of the letter in evidence in connection with her explanation of wages claimed to be due her. This offer was received on that basis, and upon no other. (*Transcript, p.* 43).

In view of the fact that the only objection to the admission of the first portion of this letter was upon the ground of marital privilege, it would seem that the former ruling of this court holding the wife to be entitled to testify in a case such as this, disposes of the assignments of error based upon that objection. It was conceded that the first portion of the letter was competent as a prior statement conflicting with her testi-

letter, that was unquestionably rendered competent by re-cross examination at *Page* 40, *Transcript,* above referred to, wherein the witness stated her purpose in writing this letter. In order to weigh her statement, it was obviously necessary that the jury should have access to the whole of the letter. Otherwise, they could not know whether the statement was credible or not, nor could they know, on the other hand, how much weight to give the first portion of the letter, already admitted as an impeachment of her statement denying any suggestion of prostitution by her husband.

What has been said concerning the letter in question applies with equal force to the testimony of the witness Baldwin referred to in the third assignment of error. On her cross examination, already referred to, the witness stated she had never practiced prostitution since her marriage, that she had never associated with prostitutes, that she had never been in or about houses of ill fame or visited resorts frequented by questionable people, and generally asserted her respectability and the legitimacy of her occupation at the Boise Rooming House. The testimony of Baldwin (*Transcript, p.* 44) was to the effect that prior to the arrest of plaintiff in error, upon the occasion of a visit by him as city patrolman to the Boise Rooming House, which was a house of prostitution occupied by prostitutes who were accustomed to paying fines in the city police court, Zella Pappas stated very forcibly her reluctance to go before the police judge and pay a fine, and then followed him out of the room and requested him to take her fine to the police judge. This statement on her part was offered for the same purpose as the first portion of the letter referred to. The testimony concerning this statement was objected to upon the ground that it was a statement made without the hearing of the defendant. Again there was no objection to its admission for the purpose of impeaching her testimony given on cross examination; and again, on the other hand, this state-

the guilt of the defendant, but merely as a prior statement in conflict with her testimony on cross examination.

Neither the letter nor the testimony of Baldwin concerning this statement were subject to the objection submitted. Had the testimony been offered as statements binding upon plaintiff in error and tending to prove the charge laid against him, it would doubtless have been subject to the objection that it was hearsay and that the statements had been made outside his presence and hearing; but being offered as prior conflicting statements and the offer being limited to the purpose of impeachment, the assignments of error are not well founded for two reasons, either of which is sufficient in itself. First, no objection was made to the admission of the evidence for the purpose for which it was offered; second, had such objection been made, it should properly have been overruled. In *Tacoma Railway and Power Company vs. Hays,* 110 *Fed.* 496, this court has held the admission of evidence for the purpose of showing prior conflicting statements made by a witness who has been placed upon the stand by the party seeking later to introduce such impeaching testimony, to be within the discretion of the trial judge. The court in its opinion quotes, among others, *Hickory vs. U. S.,* 151 *U. S.* 303, 38 *L. Ed.* 170, in which case the admission or rejection of such evidence is held to be within the discretion of the trial judge, and in which opinion the following language appears:

> "We cannot say that an error was committed because the court *in the exercise of its discretion,* under the circumstances, declined to concede any further relaxation of the rule." (Italics ours).

We submit that plaintiff in error cannot now object to the admission of evidence which was received for a purpose for which it was conceded (*Transcript, p.* 37) to be competent, and which was admitted under circumstances which left its admission, by the rule of this Court, in the discretion of the

ments were hearsay and made without defendant's hearing was not properly directed to the offer for the reason that the evidence was neither offered nor received upon the issue of his guilt or innocence.

It was a practical necessity that the government should depend upon the witness Zella Pappas for evidence showing the interstate transportation. Having used her for this purpose, it would be a hard rule indeed, and one subversive of the ends of justice, to hold that the government should thereby be bound by any statement which she might choose to make upon other matters in the course of her cross examination, more especially so in a case such as this, where the witness had verbally and in writing, on several different occasions, stated the exact opposite of that to which she testified in cross examination.

CONCLUSION.

In conclusion we respectfully submit that the prayer of plaintiff in error for a new trial should be denied, and the judgment of the learned trial court be affirmed.

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